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Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL A/K/A LUKE SKYYWALKER, CHRISTOPHER WONGWON A/K/A FRESH KID ICE, MARK ROSS A/K/A BROTHER MARQUIS, DAVID HOBBS A/K/A MR. MIXX; PROFESSIONALLY KNOWN AS THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

—v.—

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PEN AMERICAN CENTER, IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE of PEN American Center

THE INTEREST OF THE AMICUS CURIAE *

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors, chartered to defend free and open communication within all nations and across national boundaries. American PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb, or limit freedom of speech or expression in the nation.

As an organization of writers, PEN recognizes that the proper application of the copyright law assists authors -- and ultimately the public -- by giving authors an economic incentive to create those works. By protecting authors against any unauthorized use of their creations that would deprive them of the proper economic value of their writings, copyright law serves the interests of authors and readers alike.

By the same token, authors are often consumers and borrowers of material previously written by others. To paraphrase the famous remark of Sir Isaac Newton, all writers "stand on the shoulders of giants," in the sense that they use the facts, ideas, concepts or the style and technique of those who wrote before them. No author begins on a clean slate. As Justice Brennan stated in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 582 (1985)(Brennan, J. dissenting): "Were an author able to prevent subsequent authors from using concepts, ideas and facts contained in his or her work, the creative process would wither and scholars would be forced into unproductive replication of the research of their predecessors."

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* Letters of consent to the filing of the within amicus brief are being lodged with the Clerk of the Court simultaneously with the filing.

Not only do authors use prior material created by others *as a resource*, but they also makes it a *point of reference*, for later creative activity. Most writing is a reaction or a response to prior ideas, theories or arguments. It is a given that a published work may be quoted extensively by a later author for the purposes of comment, criticism and analysis. In addition, since expository writing is not the only way in which society presents and debates its governing principles, often a prior work is used in other ways as a jumping off point for additional observation and comment. In particular, a prior work should be able to be used through other literary devices, such as parody and satire. So long as the later use is not a substitute for, and therefore a direct competitive danger to, a prior creation, such use should be widely allowed.

In the case now before the Court, the Court below applied a mechanical and rigid approach to the question of parody in the music field. But the rule it established applies to literary creation as well. The Sixth Circuit interpreted the protection of the copyright law so expansively as to limit the ability of creative artists in every field to use prior material for constructive, non-competitive purposes. Because the decision below, by its overprotective ruling on the scope of the fair use doctrine relating to parody, significantly restricts the ability of authors to use previously published material, the Amicus urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Viewed from the perspective of the copyright decisions of this Court, the Sixth Circuit opinion flies in the face of this Court's analysis in *Harper & Row, Publishers, Inc v. Nation Enterprises*, 471 U.S. 539 (1985). That case made clear that the determination of fair use under Section 107 of the copyright law involves a four part test, in which the commercial use of copyrighted material is only one element to be considered in the total calculus of fair use. The Sixth Circuit has converted the four-part test embodied in Section 107 into a one-part test: the only issue that appears to count is whether a commercial use was made of the original material.

Even though, in the case now before the Court, a parodist took original material openly and for the avowed purpose of using it in a totally different way, the Court of Appeals did not appreciate the humor in the situation and decided that not enough criticism or comment on the original material was made. "Failing a direct comment on the original, there can be no parody," 972 F.2d at 1436, n. 8. It appears to have seen its role as that of a musical or literary critic, rather than as a court interpreting a law that promotes creative activity while accommodating the right of all to express themselves.

The conclusion reached by the Court below cannot be squared with either the words of the statute, this Court's decision in *Harper & Row* or the need to accommodate First Amendment interests in interpreting the Copyright Law.

Furthermore, the approach taken by the Court below totally ignores the importance of parody as a literary art form. As noted above, prior copyrighted material is often used as a point of reference for later authors, and no rigid rule should be established that would undercut such use for satire and parody. It would be a appalling anomaly if the principles of copyright, which are designed to assure the "progress of science

which are designed to assure the "progress of science and the useful arts," (Const. Art. I, Sect. 8, cl. 8) are now applied to act as a barrier to that progress.

ARGUMENT

I.

THE SIXTH CIRCUIT'S RIGID AND MECHANICAL APPLICATION OF THE FAIR USE FACTORS IS CONTRARY TO THE PURPOSE OF THE COPYRIGHT LAW AND DEPRIVES THE PUBLIC OF THE BENEFIT OF NON-COMPETITIVE PARODY

A. The Songs in Question.

The two songs at issue in this case come from opposite sides of the popular music spectrum. Respondent's work "Oh, Pretty Woman," was written and recorded by Roy Orbison and William Dees in 1964, and has become a pop music standard. It gained renewed popularity after it became the theme song of the successful 1991 film, "Pretty Woman" with Richard Gere and Julia Roberts.

The original song describes how a "pretty woman," is "walking down the street, Pretty woman, Girl -- you look so sweet." The woman rejects the advances of the male admirer, but later changes her mind, to the joy of the singer. The girl in the song is attractive, admired and finally becomes interested in her suitor. The tone of the song is lyrical, soft and sweet, and the music, with a country rock rhythm with moderate electric instrumentation, is rich and soothing. Its message is whimsical seduction.

Petitioner's song has a totally different feel and theme. The "pretty" women who is the subject of the "2-Live Crew" song is not someone longed-for and admired by the singers.

Big Hairy woman -- You need to shave that stuff.

Big Hairy woman -- You know I bet its tough.

Big Hairy Women -- all that hair ain't legit, Cause you look like "cousin it."

Two timin' woman -- Girl, you know it ain't right.

Two timin' Woman -- You's out with my boy last night.

Two timin' Woman -- That takes a load off my mind.

Two timin' Woman -- Now I know that baby ain't mine.

The genre of petitioners' song is rap music, which is about as far removed from the Roy Orbison song as is possible in the field of popular music. Two-Live Crew is known for the blunt, misogynist message of its songs and the hard rhythm of its beat. This message is communicated in both lyrical content and musical form. Petitioners use the same drum beat and bass riff as Roy Orbison did to start the song, but the soft message of the original is immediately diverted when a "scraper" is used to distort the melody and the first soloist sings off key. As the district court described the musical process, "four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record," 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991).

B. The Sixth Circuit Decision

Despite the great distance in theme and musical approach between the two songs and the different audiences to which they were directed, the Sixth Circuit decided that there could be no finding of fair use. The Court came to its erroneous result because of its

inflexible and crabbed analysis of the four fair use factors found in Section 107 of the Copyright Law.

It began its analysis by holding that because the 2-Live Crew recording was "included on a commercially distributed album," its use was presumptively unfair, 972 F.2d at 1436. "We find that the admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use." id. at 1437.

It then held that the second factor -- the nature of the copyrighted work -- also weighed against a finding of fair use since Respondent's song was a creative and artistic work, and less scope is afforded to quotation from such works. id., at 1437.

With respect to the third factor, the amount and substantiality of the use, the Sixth Circuit concluded that a substantial amount of original material was taken: ". . . the copying was qualitatively substantial." Furthermore the "heart of the original" work was taken and was made into the "heart of a new work." id. at 1438. This amounted to a "purloin[ing of] a substantial portion of the original," id.

Finally, the Sixth Circuit concluded that the final factor -- the effect upon the potential market -- also tipped in favor of the Respondent. This Court has determined this factor to be the most important of the elements described in Section 107. The Court below held that the commercial nature of the use precluded any finding of fair use. ".. . the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists." 972 F.2d at 1438.

C. The Flaws In the Sixth Circuit Decision

The inadequacies of the Sixth Circuit's decision can be shown by applying the court's analysis to some other famous parodies in English literature. Everyone

recognizes and admires the famous nonsense lyrics in Lewis Carroll's *Alice in Wonderland*. But to the audiences of the time, the lyrics were even more pointed and telling since they were obvious parodies of the sentimental and cloying Victorian verse of the late Nineteenth Century -- moralizing poems, "written for the edification of the young." [2] For example, Robert Southey wrote a melodramatic poem called "The Old Man's Comforts and How He Gained Them." The first two stanzas read as follows:

> *"You are old, Father William," the young man cried;*
> *"The few locks which are left you are gray;*
> *You are hale, Father Williams - a hearty old man:*
> *Now tell me the reason, I pray."*
>
> *"In the days of youth," Father William replied,*
> *"I remembered that youth would fly fast,*
> *And abused not any health and my vigor at first,*
> *That I never might need them at last."*

Lewis Carroll used the lyrics as a basis to write his famous "Father William" poem:

> You are old, Father William, the young man said,
> "And your hair has become very white;
> And yet you incessantly stand on your head-
> Do you think, at your age, it is right?"

---

2 See Dwight MacDonald's anthology, "*Parodies: An Anthology from Chaucer to Beerbohm -- And After*" (1985) at 278. The lyrics that follow are found in that collection at 279-282.

"In my youth," Father William replied to
his son,
"I feared it might injure the brain;
But now that I'm perfectly sure I have
none,
Why, I do it again and again."

Similarly, Dr. Isaac Watts wrote a poem, "Against Idleness and Mischief" as a moral lesson for youth:

How doth the little busy bee
Improve each shining hour,
And gather honey all the day
From every opening flower!

How skillfully she builds her cell!
How neat she spreads the wax!
And labors hard to store it well
With the sweet food she makes.

In works of labor or of skill,
I would be busy too;
For Satan finds some mischief still
For idle hands to do....

Lewis Carroll's version is as follows:

How doth the little crocodile
Improve his shining tail,
And pour the waters of the Nile
On every golden scale!

How cheerfully he seems to grin,
How neatly spreads his claws,
And welcomes little fishes in
With gently smiling jaws!

Another well-known Victorian poem was David Bates' "Speak Gently:"

Speak Gently; it is better far
To rule by love than fear;
Speak gently; let no harsh word mar
The good we may do here.

Speak gently to the little child;
Its love be sure to gain;
Teach it in accents soft and mild;
It may no long remain.

Lewis Carroll sent a different message:

Speak roughly to your little boy,
And beat him when he sneezes;
He only does it to annoy,
Because he knows it teases.

I speak severely to my boy,
I beat him when he sneezes;
For he can thoroughly enjoy
The pepper when he pleases!

If Robert Southey, Dr. Isaac Watts and David Gates were current authors and *Alice in Wonderland* had been written today, there is little doubt that under the Sixth Circuit analysis, Lewis Carroll would be guilty of copyright infringement. There is no question but that Lewis Carroll wrote *Alice in Wonderland* for commercial gain -- he hoped to make money from the book. The poems written by Messrs. Southey, Watts and Gates were creative, artistic works and thus subject to very limited appropriation by others. Substantial portions of the earlier works were unquestionably "taken" by Carroll-- whole lines in the Southey and Watts poems were copied and the meter and rhythm of each of the other poems, as well as their basic structure, were also used. Finally, since commercial use was made of this material by Carroll (through publication and sale of his books) and the authors involved could conceivably have parodied their own works and made money from them, the fourth fair use would also have weighed in their favor.

Any method of analysis that would lead to the conclusion that fair use would not apply to Lewis Carroll's creations leaves much to be desired.

The Sixth Circuit approach to the question of fair use in parody cases is deficient in at least three respects: (1) the Court in fact did not apply the four-part fair use test, but applied a one-part test in which the commercial use of the material dictated the result under each of the factors; (2) even if the Court had applied the four-part test, it did not take into account the fact that a parodist must use considerable amount of copyrighted material to "conjure up" or present the original in order to satirize or burlesque it; a court cannot make literary judgments about the exact minimum quantity that could be copied to make the parodists' point; (3) in parody cases, the four-part test should be modified if not scraped altogether and the court should focus primarily on the issue of whether the parody is a substitute for the original.

1. The Failure to Apply the Four-Part Test.

The initial error of the Court below was its refusal to properly apply the four fair use factors of Section 107. What the Court did was to apply a single factor analysis -- it held that since the 2-Live Crew song was commercially distributed, than that automatically required a finding of infringement and precluded any finding of fair use. The same element of alleged commercial use dictated the result in the application of all fair use factors.

Thus, according to the Sixth Circuit, the commercial nature of the song required a finding that (1) the use of the song was improper; (2) the taking of the copyrighted song by a commercial user afforded less scope for copying; (3) the amount taken was substantial given the commercial nature of the use; (4) the effect upon the market was considerable, since defendant's use was "commercial."

That is not what Congress decreed in Section 107 or what this Court held in the *Harper & Row* case. In Section 107, Congress noted that in determining whether a particular use was fair, courts should consider the "purpose and character of the use, `including` whether such use was of a commercial nature," indicating that it was one of a number of factors to weigh.

Furthermore, in its recent amendment to Section 107, Congress rejected any single factor analysis in determining fair use. Congress amended the law in 1992 to insure that all four factors be separately analyzed. It added the following sentence to the law: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is based upon consideration of all the factors." P.L. 102-192, 106 Stat. 3145 (October 24, 1992). The law was passed in reaction to some decisions of the Second Circuit that seemed to overemphasize the unpublished nature of the work as key to a finding of fair use. See *Salinger v. Random House*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (9187) and *New Era Publications, ApS. v. Henry Holt and Company*, 873 F.2d 576 (2d Cir. 1989) *cert. denied*, 493 U.S. 1094 (1990).

This Court in *Harper & Row* noted that the commercial use was a separate "factor that tends to weigh against a finding of fair use," 471 U.S. at 562, again indicating that it was not the sole determining factor. The Sixth Circuit's decision which placed such great and critical emphasis on the commercial nature of the use misconstrued the law.

2. The Misapplication of the Four-Part Test.

To the extent the Sixth Circuit attempted to apply the four-part test, it did so without a proper recognition of how the courts should weigh the various factors, particularly in a parody case. The Court noted that the four part test has to be modified to some extent since by definition there is a substantial "taking" of copyrighted material when a parody is created. But the

Court gave this truism very grudging recognition. The Court quoted from *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979) to establish the following test: "Whether the parodist has appropriated a greater amount of the original work than is *necessary* to 'recall or conjure up' the object of his satire." (emphasis added).

Every court and commentator has noted that enough of the original material must be "conjured up" to be used by the parodist for his or her purposes. The audience must be "set up" by certain expectations that are triggered by viewing or listening to the some of the original.

In the Lewis Carroll instances, the Victorian audience had to be reminded of the lofty moral sentiments of the flowery verses created by Southey and others. Enough of the earlier material had to be used to elicit those reactions and expectations. Once those sentiments were generated by exposure to some of the original, the parodist could pull his or her surprise and dazzle and overwhelm the audience by the unexpected turn taken in the new creation.

But it not up to the courts to determine exactly how much of the original "is *necessary* to 'recall or conjure up' the object of his satire," as the Sixth Circuit noted. Courts are not equipped to determine the exact amount of material that would create the critical expectations, or to decide that a lesser amount would have sufficed, or that the parody did not work. That is the function of the author or composer. Courts cannot make those sort of judgments. As Justice Holmes stated in another context in *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 251 (1903): "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations outside of the narrowest and most obvious limits." See also *Esquire, Inc. v. Ringer*, 591 F.2d 796, 805 (D.C. Cir. 1978):

"Neither the Constitution nor the Copyright Act authorizes the . . . federal judiciary to serve as arbiters of national taste."

Judge Pierre Leval has made the same comment with respect to parody, see *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 281 (S.D.N.Y. 1992). In holding that a parody cover of the "Farmer's Almanac" was protected by the First Amendment, he commented:

> It is one thing to reject a First Amendment claim because the court disbelieves the claim that a communicative message was intended. It is quite another to reject a First Amendment claim because the court gives low marks to the success of the literary device. Courts are ill-equipped to pass literary judgments.

That is precisely what the Sixth Circuit did here. In rejecting the claim of fair use as parody, the Court noted: "Failing a direct comment on the original, there can be no parody," 972 F.2d at 1436, n. 8. By deciding that more than "necessary" amounts of the original material was taken and that the parody did not work because there was no comment on the original, the Court misapplied its role and came to an erroneous conclusion as to the correct legal rule to be applied in a parody-fair use situation.

3. A New Parody Test.

The above analysis leads to the following conclusion: the four factor fair use test cannot be applied in the same way or perhaps should not be applied at all in a parody situation. The first fair use factor contemplates that a second user would use earlier material in a critical manner, for educational, research or news-reporting or on a different level of use. But in parody, the original material must be close to the second use or the expectations on which the parodist depends cannot be created.

With respect to the second factor, creative material is almost always used by a parodist since distinctive elements of style and theme must be played with, copied and built-upon.

With respect to the third factor, substantiality of use, by definition, substantial parts must be used in a parody.

In short, if the fair use factors are applied in their normal manner, a parodist would find it difficult to succeed in any case, without considerable modification and distortion of the factors by the courts.

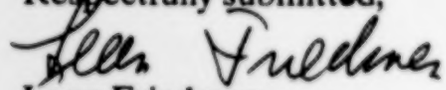
The solution may lie in focusing on the fourth factor, which this Court has already determined to be the most important. Unless the parodist uses original material in a manner that acts as a direct substitute for the first creation, there should be no finding of infringement. The test would require a showing that customers were diverted from buying or using the original, not because the parody illuminated the weaknesses or shallowness of the first creation, but because the second work served the same purposes and answered the same need as the original for the same type of audience.

That test was not evenly remotely met here. The district court properly determined that the basic purpose of parody was met and that the use should be allowed. That finding should have been affirmed.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,



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